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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

29 CHASOM BROWN, MARIA NGUYEN,
30 WILLIAM BYATT, JEREMY DAVIS, and
31 CHRISTOPHER CASTILLO, individually and
32 on behalf of all other similarly situated,

33 Plaintiffs,

34 v.

35 GOOGLE LLC,

36 Defendant.

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60 Case No. 5:20-cv-03664-LHK

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PLAINTIFFS' RESPONSE TO
64 GOOGLE'S FEBRUARY 26 AND
65 MARCH 1 DECLARATIONS

1 Pursuant to the Court’s Orders (Dkts. 109 & 110), Plaintiffs respectfully submit this brief
 2 response to the two declarations filed by Google (Dkt. 106 & 107).

3 Google’s filings are remarkable both for what they admit and omit. Google admits that it
 4 uses traffic to this Court’s website “to serve relevant advertising, and maintain and improve
 5 Google services”—whatever that means. Dkt. 107 ¶ 13. Yet Google’s filings provide no support
 6 for Google’s motion to dismiss and in fact raise more questions than they answer. Google did
 7 not meaningfully answer the Court’s questions, nor did Google answer questions that Plaintiffs
 8 sent to Google via email. *See Ex. A at app. B.* To obtain those answers, Plaintiffs have served
 9 Google with a Rule 30(b)(6) deposition notice. Ex. A. Plaintiffs’ counsel hope that Google will
 10 cooperate in scheduling this deposition promptly and without the need for motion practice.

11 **First**, Google failed to meaningfully respond to the Court’s requests. The Court
 12 requested a declaration regarding “exactly what the company [Google] is doing with users’
 13 information” from the Court’s website. Hearing Tr. at 54:8-9; *see also id.* at 56:25-57:2 (“I
 14 would like a declaration about exactly what Google does … with users’ information who visit the
 15 Court’s website”); *id.* at 58:13-16 (“I would like a declaration from Google about what
 16 information they are collecting about users who visit the Court’s website and what that is used
 17 for in any way in enhancing user profile data or in targeted advertising”).

18 In response, Google identified certain Google code (or “scripts”) embedded in the Court’s
 19 website (the “Google scripts for Maps and Fonts” referenced in Dkt. 106 ¶ 6) but failed to
 20 provide any details regarding what information Google collects with those Google scripts, how
 21 those Google scripts function, and what Google does with that information. Google’s counsel’s
 22 declaration includes a screenshot with five categories of Google scripts (cse.google.com,
 23 fonts.googleapis.com, fonts.gstatic.com, maps.googleapis.com, and www.google.com) (Dkt. 106
 24 ¶ 6) but no details about how those function. In Google’s product manager’s declaration, Google
 25 identified its search technology on the Court’s website, confirming that Google collects detailed
 26 user information by way of that technology, but Google only generically described its use of that
 27 information: “***For example***, Google uses the information to return relevant search results to the
 28 Court’s website, to serve relevant advertising, and maintain and improve Google services.” Dkt.

1 107 ¶ 13 (emphasis added). This tells the Court (and the public) nothing. What are the other
 2 examples? Neither Google filing explains, as the Court requested, exactly what Google is doing
 3 with the information it collects when people visit the Court’s website, both for the third-party
 4 services (*i.e.*, services Google provides to the Court) and Google’s own separate purposes.

5 **Second**, Google failed to provide the information Plaintiffs requested, which Plaintiffs
 6 believe would be helpful to the public. During the hearing, the Court asked Plaintiffs’ counsel to
 7 specify information they wanted from Google. Tr. at 54:7-19. Plaintiffs identified specific
 8 topics, including “what information is Google collecting” and “what does Google then do with
 9 that information” and “does Google associate it with user – other user profile data.” *Id.* at 55:23-
 10 56:6. On February 27, Plaintiffs’ counsel also sent Google’s counsel a list of specific questions
 11 concerning the issues raised at the hearing. Ex. A at app. B.

12 Google’s filings do not address Plaintiffs’ questions. As one example, Google’s
 13 counsel’s declaration confirms that Google embedded its GStatic script in the Court’s website
 14 Dkt. 106 ¶ 6. Plaintiffs’ allegations focus in part on GStatic (FAC ¶¶ 93, 101), and Plaintiffs
 15 asked about GStatic (Ex. A at app. B No. 8). But Google’s filings provide no details about what
 16 Google collects with GStatic and how Google uses that information, both for any services Google
 17 provides to the Court and for Google’s own separate purposes, including with respect to targeted
 18 advertising—such as after a visitor leaves the website. Google’s representation to the Court in
 19 *Calhoun* that the Court’s website “does not use the third-party services at issue” in this case
 20 (Case 5:20-cv-5146-LHK Dkt. 130 at 3:8) is false.

21 **Third**, Google’s filings confirm Google’s disregard for people’s efforts to browse
 22 privately, including on the Court’s website and thereafter. Google’s filings identify Google
 23 scripts and Google search technology embedded in the Court’s website, which cause peoples’
 24 browsers to send information to Google’s servers, including with GStatic. Importantly, with its
 25 filings, Google does not identify any way in which Google limits its collection and use of
 26 information when people visit the Court’s website in private browsing mode. Instead, Google
 27 remains intentionally vague about whether changes in unspecified user “modes” or “settings”
 28 make a difference to Google’s collection practices. *See* Dkt. 107 ¶ 12 (suggesting that “[t]he

1 exact categories of information Google receives depend on the user's browser, mode, and
 2 settings"). This is consistent with Plaintiffs' allegations that, through uniform and intentionally
 3 vague disclosures, Google leads users to believe they can control Google's collection and use of
 4 their information by browsing privately, but Google then uses its scripts to collect their
 5 information and track users on and off of websites without consent, leveraging and sharing
 6 knowledge about the users' most sensitive moments.

7 **Fourth**, Google's filings confirm the inadequacy of Google's disclosures and Google's
 8 failure to obtain consent from those whose data it captures. In his filing with the Court, Google's
 9 counsel identified Google scripts using developer tools, which were not the scripts he identified
 10 for the Court at the hearing. At the hearing, Google's attorney claimed that the Court's website
 11 uses Google Analytics, and his declaration acknowledges that he was wrong because he and his
 12 team misunderstood the results of the developer tools. Dkt. 106 ¶¶ 5-6, 8-9. This is troubling.
 13 Google's defense in this litigation is that users were aware of Google's specific collection
 14 practices and that users consented to those practices. It defies reason for Google to expect users
 15 to identify and understand scripts and technologies used by Google to collect their private
 16 browsing information when even Google's own attorneys, armed with sophisticated developer
 17 tools and unlimited resources, are unable to accurately do so for this Court, both at the hearing
 18 and in its subsequent filings. Still, Google's counsel's statements confirm Plaintiffs' allegations.

19 **Fifth**, Google's filings provide no support for Google's motion to dismiss, and they
 20 instead demonstrate that these are complicated factual issues ill-suited for any resolution on the
 21 pleadings. In addition to the confusion by Google's counsel, and Google's failure to answer
 22 questions posed by the Court and Plaintiffs, the filings in the *Calhoun* matter detail how these
 23 different Google scripts in fact cause peoples' browsers to send detailed personal information to
 24 Google. *See* 5:20-cv-5146-LHK Dkt. 127. It appears that Google is also doing that when people
 25 visit the Court's website in a private browsing mode. That is something Plaintiffs will cover
 26 during the noticed 30(b)(6) deposition. *See* Ex. A. Google's filings warrant further discovery,
 27 not dismissal of any claim. Plaintiffs will, if the Court so requests, submit a copy of the 30(b)(6)
 28 deposition transcript to the Court as soon as it becomes available.

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